United States
Circuit Court of Appeals
For the Ninth Circuit

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,

Plaintiff in Error,

vs.

BARTHOLOMEW CHAMBERLAIN,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

Upon Writ of Error to United States District Court for the District of Idaho, Northern Division.

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STATEMENT

(We will refer to the parties as plaintiff and defendant.)

We will restate the case since the defendant has taken the most favorable view that could be placed upon its own testimony, disregarding the plaintiff's witnesses entirely.

This writ of error is taken from the verdict of the jury and judgment in favor of the plaintiff in the sum of Five Thousand Dollars for personal injuries. The verdict was originally Seven Thousand Five Hundred Dollars, and reduced by the trial court upon argument of a petition for new trial.

The plaintiff was a pioneer homesteader having a little farm on the St. Joe River about a half mile from the defendant's station of Herrick. This station was maintained as a regular stop with depot building, platform, etc., but a short time before the accident the defendant had loaded the depot building onto cars and moved it to some other point upon its line. The building and platform had been built up on posts over a large depression, so that the platform and depot building were about ten feet above the ground. Before its removal, the depot building fitted close up against the platform, making an effective guard or barrier along the back side of the platform. The platform was about eleven feet wide and eighty feet long. The removal of the depot building left an open hole

from ten feet to thirteen feet deep along side of the platform, for a distance of forty feet, so that if a person walking along the platform took a misstep, he would fall into an abyss ten to thirteen feet deep. No railing, guard, barrier, or protection of any sort was erected along the edge of this platform after the removal of the depot, nor was the platform in any manner lighted at night.

The station was still maintained as a regular stop, tickets being sold from other points of the line reading to Herrick and passengers being allowed to take the train at said point and pay cash fare. All the passenger trans discharged and took pássengers, and it was maintained as a regular stop without flag.

On the day of the accident, the plaintiff left his farm, went up to a station of Marble Creek to purchase some groceries, and on his return trip, was picked up by two signal maintainers, operating a motor speeder, who had been making a practice of carrying passengers for hire, and upon the plaintiff and others paying a certain fare, was carried on down to Herrick, where he poled across the river in a boat to his farm, and got ready to go on down to Plummer, several stations west, on the evening passenger train. The train was considerably late, and arrived at Herrick after dark. No light of any kind was maintained about the depot platform or grounds and the night was very dark, the place being shadowed by hills, a distance back

from the track.

The train being a couple of hours late, plaintiff waited a short distance away from the depot until he heard the train coming. After the train pulled around a curve, the intense light of the headlight struck the plaintiff in the eyes, blinding him, and in attempting to walk up to the passenger coach, he stumbled over a trunk left on the platform and fell over the edge into the hole, striking on a stump at the bottom. The plaintiff lay unconscious for a period of time but was afterwards picked up, after having been exposed to the cold (it being about the middle of November) was carried into a nearby house, and later taken to the St. Maries hospital, where he was found to be suffering from a broken shoulder, three of his ribs were fractured, from which in a few days, a severe case of pneumonia set in, plaintiff remaining under the care of a doctor until about the time of the trial.

ARGUMENT

This case is very simple. The negligence charged in the complaint was not denied at the trial. It is not contended by the defendant that the platform was railed or guarded or that it was lighted. Neither is it contended that a guard or light was unnecessary. The defendant's argument amounts to this: 1. Plaintiff knew that the depot building had been moved, and that the hole was unguarded. 2. That *certain witnesses for the defendant* testi-

fied that he was intoxicated. 3. That the verdict is still excessive, notwithstanding its reduction by the trial court.

Before citing our authorities, and taking up the assignments of error as set out in defendant's Brief, we shall briefly show the fallacy of each of these three positions.

1.

It is true that plaintiff knew in a general way of the conditions at the platform and station, and knew of the removal of the depot building. However, before the accident, he had no such minute knowledge of the conditions about the platform as he displayed at the trial. A very violent assumption is made in the defendant's Brief by crediting the plaintiff with a knowledge of the length, breadth, and minute description of the platform, and assuming that he had all this knowledge in advance of the accident. Of course, all this was learned after he had been hurt, in order that he might testify. Skillful avoidance is also made in the defendant's Brief of the fact that this accident occurred in the dead of night. Had the plaintiff walked out on this platform in the light of day, serious doubt might be entertained of his right to recover, but on an unlighted platform, his attention distracted by the blinding light of the locomotive, the bustle and excitement naturally atendant upon the arrival of a transcontinental train, *makes an entirely different case.* In addition, a trunk had

been left in his way, and of which he was not aware, so that any general knowledge of the condition was as effectively erased from his mind as if it had never been there. A very patent effort has been made to quote from the defendant's own witnesses and place the most favorable construction possible upon their testimony, when, of course, the jury has found the facts to be in accordance with the plaintiff's theory.

2.

Similary, great stress is laid upon the evidence of two employees of the defendant who testified that the plaintiff was intoxicated. The plaintiff and at least three other witnesses testified that the plaintiff was sober. While there was a sharp conflict upon this point in the evidence, it was a question for the jury, which has been resolved in favor of the plaintiff, and is not subject to review by the appellate court.

3.

The third contention is likewise not subject to review by the appellate court. The rule that has been repeatedy adhered to by this court and the Supreme ourt of the United States is that the *discretion* of the *trial court* in passing upon the *amount of the verdict* is not *subject to review.*

SPECIFICATION OF ERROR I.

The plaintiff's statement that he intended to board the train, made on the platform just as the train was arriving, and before the accident (p. 87,

88) and without any knowledge that he was going to be hurt, was properly admitted. Such declarations are weighed to determine if they are made with any design or motive, and if they appear to be involuntary, they become a part of the happenings themselves, and are proper evidence.

In an Ohio case *Railway Co. vs. Herrick,* 49 Ohio State, 25, 29 NE 1052, the statement of an intending passenger that he was "going to Collins" made at his home, before going to the depot, was offered to show intention to become a passenger, and the court held it should have been admitted:

> "Was his declaration that he was 'going to Collins' competent evidence of that fact? That depends whether the declaration was contemporaneous with, and explanatory of, the act of departure. One departing from home may have in view any conceivable place, or any conceivable purpose, as his destination or object. The act of departure is thus in itself of the most ambiguous character; it does not afford the slightest cue to the object of the journey; it is natural and usual—according to the common experience of mankind—that the party should say something respecting his departure, of an explanatory character. Declaration thus made are a part of the act itself."

The rule is stated in 6 *Thompson Negligence* 674:

> "The evidence offered must not have the ear marks of a device, or after-thought, nor be merely narrative of a transaction which is really and substantially past. The rule will allow proof of declarations uttered before the happening of the accident if connected with and a part of the transaction—as, for example,

> a declaration of an intention to become a passenger made by one injured at a railway station."

In *Denver Co. vs. Spencer,* 52 Pacific 211, the statement of the deceased that he was to meet a person at the train made several days previous to the accident, was admitted where the court quoted Horton on Evidence, with reference to such statements:

> "Their sole distinguishing feature is that they must be the automatic and necessary incidents of the litigated act, necessary in this sense; that they are part of the immediate preparation for, or emanations of, such act, and are not produced by the calculated policy of the actors."

Baltimore Railway Co. vs. State, 32 Atlantic 201. Deceased conversation admitted in evidence consisted in statements made to friends just before boarding the train that he was going to Washington. The court said:

> "Such declarations of the decedent, made at the very moment of time immediately preceding the act of the defendant Company, by which he lost his life * * * and was properly admissible."

See also *Chicago Railway Co. vs. Chancellor,* 46 Northeastern 269.

SPECIFICATIONS OF ERROR II.

The testimony with reference to the two employees operating the speeder, accepting money for the transportation of the plaintiff on his trip down from Marble Creek, was admitted in rebuttal.

The signal maintainers had already testified that they encountered the plaintiff and others in a drunken condition (p. 138), and that for the purpose of their own protection to save them from injury on the railway right of way, they carried them on the speeder. To overcome the theory that the plaintiff was intoxicated, and to show that no such motive prompted these employees of the Company, it was proper to allow the plaintiff's witnesses to testify to the real reason for their being carried. The plaintiff and his witnesses testified that they were carried not for any humanitarian reason, but were simply carried for money. The purpose for which they were carried thus became very material. While the fact that they were picked up without any payment of money would tend to corroborate the defendant's theory that the plaintiff was intoxicated; on the hand, if they were carried as a commercial proposition for money, it would tend to corroborate the plaintiff's theory that he was sober. It was for this purpose that the testimony was admitted. (See pages 172 to 174.)

SPECIFICATION OF ERROR III.

THE STATION WAS A REGULAR STOP TO DISCHARGE AND TAKE ON PASSENGERS.

The plaintiff *Chamberlain* testified concerning the station, as follows:

Q. After the depot was moved what did the Company do with reference to maintaining that as a station?

A. They take on passengers, selling tickets, just the same as they did before.

Q. What trains made stops there after they took the depot and about the time you got hurt, on November 15, last year?

Well, I didn't understand that.

Q. I say what trains made stops there?

A. It is the one that goes up in the morning at 10:22, which we called that 18.

Q. That is a passenger train?

A. That is a passenger. And in the evening the same, we call that 17, going toward Spokane, at 5:02, supposed to be; it used to be.

Q. I will ask you whether or not the Company continued to sell tickets from other points on their line to that point?

A. They sold tickets, and I think, I actually believe they are selling right to this day, because it ain't more than a week or so that I got a ticket right from St. Maries to Herrick myself; it ain't more than a week or so.

Q. What is the fact as to whether or not passengers are picked up there from day to day, and were picked up at about the time you were hurt, by the Company?

A. Well, they were taking passengers with the flags.

Q. And did they do that from day to day?

A. Well, I don't know whether they would do it today, but if you are on the platform they will stop or slow down, and another thing I will say, I was on the platform when another man came, and there was nobody got on and nobody got off; there was a man that wanted to take the train that evening, and asked me whether, if they have to flag this train. And I said, "He is the conductor there; ask him,

there at the door." The conductor replied to him, and he says, "No, we stop here, and we have no order to discontinue this place or go by, *we stop whether passengers or no passengers*". I hear the conductor say that myself. (pp. 44 and 45.)

....*William Kirkpatrick,* the agent for the defendant Company at Marble Creek, an adjoining station, testified with reference to the maintenance of a station:

Q. But they still continued to take on passengers and discharge passengers after they removed the depot?
A. Yes, sir.
Q. And sold tickets to that point?
A. We did, yes, sir. p. 170 and 171.)

There is a division of authority with reference to the duty a railroad company owes an intending passenger. No distinction is made in some cases between a passenger about to board a train and one actually upon a train, the rule of the highest degree of care being applied in each case. However, the court in the present case instructed the jury that the defendant owed the plaintiff the duty of ordinary care in maintaing its platform, and we are willing to abide by that rule in this case.

THE FAILURE TO GUARD AND LIGHT THE PLATFORM WAS THE EXERCISE OF NO CARE AT ALL.

The plaintiff *Chamberlain* testified as follows:

Q. Was there any light about the depot, any light that you saw there?

A. No, there is no light of any kind there, outside of the locomotive light.

Q. Is there any light about the depot building or grounds which would in any way light up the platform or this hole or the edge of the platform in any way?

A. No light of any kind, unless a person would come, the trains would be late, and away after night they might bring a lanter to flag the train, is all.

Q. Was there any guard or barrier or any protection of any sort about the edge of this platform next to the hole?

A. No protection, no guard of any kind at that time.

Q. What was the condition of the night, as to being dark or otherwise?

A. Well, being as the train was late, I should judge, from the best I know, that the train was late, and it was getting dark,— it was pretty dark, but how dark, of course, I wouldn't say. It was a dark night.

Q. At the time the train pulled in what was the condition of the night then?

A. A dark night.

Q. Is there anything about that country there that makes it dark?

A. On account of being so deep among the mountains, of course, it will be naturally darker than it would be on a level, in open country.

AUTHORITIES ON LIABILITY

In *Chesapeake Railway Co. vs. Honley,* 159 S. W. 1147, it was contended that the depot being in a thinly populated country where a little business was done, obviated the necessity of light and guard rails. The back of the platform was five or six

feet from the ground, but without rails around the outer edge. No agent was maintained at the depot, and the court said:

> "We cannot say as a matter of law that an unlighted platform which is used after dark for the accommodation of passengers, and which is not protected by guard rails or in any other manner is reasonably safe, even if the station is located in a thinly populated part of the country, and the amount of the business done at that point is very little. The question was for jury" * * *
>
> It must be remembered, however, that the platform in question was *both unguarded and unlighted.* Had it been guarded, then doubtless no light would have been required, but on the other hand if it had not been sufficiently lighted, guard rails would have been necessary. While ordinarily it may not be the duty of a railroad company to maintain a light at a station such as this at the arrival and departure of trains, yet where the evidence shows that the platform provided is of such character so as not to be reasonably safe unless lighted, whether or not a light should be maintained so as to render the platform reasonably safe, is, under the circumstances, a question for the jury."

Edwards vs. Union Pacific, 133 Pac. 728, the negligence charged was the failure to construct the depot so as to leave space for passengers to pass along the platform to the trains. It was contended that the company could not be compelled to construct the platform according to any particular plan but the court held the test to be whether the platform was reasonably safe, saying:

"It was likewise for the jury to say whether or not the defendant had used due care in the construction and maintenance of its station platform."

In *Van Cleef vs. City of Chicago,* 130 American State Reports, 275, 23 L. R. A., (ns) 636, where the plaintiff was pushed from a platform on account of the lack of any railing, the duty of ordinary care was held to apply.

In a decision of this court, *Puget Sound Electric Ry. vs. Harrigan,* 176 Fed. 488 (ninth circuit) the defendant was negligent in failing to construct a platform of sufficient length at a point where cars were switched on a wye and no sufficient light was maintained.

In *Lancaster vs. Southern Ry.,* 92 S. C. 177, negligence was charged in failing to furnish a foot stool or to have the place of alighting from trains sufficiently lighted, and recovery was permitted to stand.

In *Cook vs. St. Louis Ry.,* 179 S. W. 501, an intending passenger was injured at a flag station where no agent was maintained, and recovery was had.

See also

Cullen vs. West Jersey Ry. Co., 85 N. J. L. 708; 90 At. 283;
Kelly vs. Boston Ry. Co., 96 N. E. 1031;
Bacon vs. Hudson, 139 N. Y. Supp. 740; 83 At. 176;
Leuteritz vs. Ice Co., 82 N. J. L. 251;
Benenson vs. Swift & Co., 127 Minn. 432;

149 N. W. 668.

INJURY OCCURRED AT NIGHT

The chief argument of defendant's Brief is that plaintiff knew of the removal of the depot building. However, as we have already pointed out, the plaintiff was blinded by the headlight of the locomotive.

The plaintiff Chamberlain testified:

> Q. Was there any light came from the train about the time you fell, and if so, describe that.
>
> A. Yes. The train was just about making this curve when I stopped to go around this trunk, and a kind of flash struck me in the face, but I don't know—I will say—
>
> A. Yes, the light struck me and kind of blinded me a little bit, and I went to go around. There was neither a guard to protect me or nobody else, and—

The night was particularly dark. The large headlight of a modern locomotive is sufficient to throw a powerful light which would effectively prevent the plaintiff from becoming aware of his real peril. The primary cause of the accident was failure to sufficiently guard and light the platform. The trunk, which the plaintiff was not shown by the record to have any previous knowledge of, was a circumstance distracting the plaintiff's mind.

In *Edwards vs. the Union Pacific Railway Company,* supra, negligence was charged in the construction of a depot platform. It was claimed that plaintiff was familiar with the conditions:

> "Her testimony was that she knew it was dangerous there between the post and the track

and that if she had seen or realized her situation she would not have stood so near."

The court in discussing an instruction given in that case, said:

"It fails to take into consideration the conditions and circumstances in which the plaintiff was placed, the presence of a crowd of persons between her and the narrow space in front of the window, the confusion which ordinarily occurs at such times, and the natural inclination of persons who are situated as the plaintiff was, to concentrate their faculties upon efforts to secure a favorable position from which to board the cars. After all, the question is, can reasonable minds differ? If from the evidence it can be said that reasonable minds might differ, the question is for the jury."

In *Puget Sound Electric Railway Company vs. Harrigan,* the brakeman was generally familiar with the conditions of the platform, which however, had been extended a short distance and to just what extent the plaintiff did not know. This court in passing upon a question of contributory negligence, said:

"While the question whether there should have been an instructed verdict on the ground of the plaintiff's contributory negligence is not free from doubt, we are not convinced, in view of the evidence, that there was error in submitting the question to the jury. The plaintiff was unfamiliar with the place at which the switching was to be done. He knew that the platform had been extended, but he did not know to what point it had been extended. The defendant did not furnish a fixed light suffi-

> cient to light up the south end of the platform. It furnished the plaintiff a lanter which, as the evidence tends to show, was not adequate to light up the premises. It had placed alongside its track a plank which was there for no explained purpose, and which was likely to deceive. In view of all the circumstances, we are not prepared to say, as a matter of law, that the plaintiff, in descending from the car as he did, with the light which he had, and in stepping upon the apparent platform beneath him, was guilty of contributary negligence such as to preclude him from recovering damages."

No claim has ever been made that the conditions of the headlight and trunk were negligence. They were causes which served to prevent the plaintiff from realizing his dangerous situation, and effectively eliminated any previous knowledge of the condition of the platform from his mind. There was ample testimony that the plaintiff was sober at the time he attempted to take the train.

> Q. Mr. Chamberlain, I will ask you, at the time you attempted to take the train there, and fell from the platform, what was you condition as to being sober or otherwise?
>
> A. I was sober, which I am a sober man. (p. 82.)

The fact that he was familiar with every detail of the questions asked by the defendant in a searching cross-examination, concerning his trip from Marble Creek, refutes the charge of intoxication. Plaintiff poled the river twice, over rapids and swift water to get home and change his clothes

after his ride on the speeder with the signal maintainers. He walked a quarter of a mile up the track just before taking the train, to talk with a man named Robinson. He is corroborated by the testimony of Frank LaBranch, Charles McDowell, and John A. Glover, who all testified that he was sober. (p. 87-107,178.) The defendant quotes from certain of its own witnesses, without in any way indicating that they are the defendant's witnesses, to make it appear that the testimony showed intoxication and entirely ignore the plaintiff's case on this point. This question has been determined by the jury contrary to the testimony of the defendant's witnesses.

SPECIFICATIONS OF ERROR IV

We contend that the appallate court will not review the trial court's discretion in passing upon motion for new trial, and the verdict as to amount of recovery, and will hereinafter cite authorities upon that question. However, out of abundant caution, we shall discuss the defendant's argument upon that point. No commission of disinterested, reputable physicians was appointed by the court or requested by the defendant to examine the plaintiff. The only evidence as to the plaintiff's condition presented by the defendant was the testimony of Dr. McCarthy, the *regularly retained surgeon and physician of the defendant.* He had never treated the plaintiff before, and in fact, had never seen him before they day of the trial. He made a

hasty examination in a few minutes of time, during a recess of court, testifying, as follows:

Q. You don't agree with Dr. Platt in his statement?

A. No, I don't.

Q. How long did you take in this examination?

A. About an hour.

Q. With this man down here?

A. Yes.

Q. What time did you get through that, Doctor?

A. I think we got through at twenty minutes to 1.

Q. With the patient?

Q. How many times did you see him?

A. Just once.

Q. And you left his hotel at twenty minutes to 1?

A. Yes.

Q. And what time did you start in?

A. Started in just as soon as we got through here.

Q. And we left here a little after 12, did we?

A. Just about 12.

Q. During those few minutes was the only time you ever saw that man in your life?

A. Yes.

Q. And you never treated him?

A. No.

Q. And this judgment is derived from those few minutes you examined him?

A. Yes. (Page 166.)

The plaintiff had been under care of *Dr. Platt* from the time of the accident up until the time of trial, who testified that his injuries were permanent:

Q. Now go on and state whether or not this condition is permanent, as to the shoulder?

A. What?

Q. Is the injury to the shoulder which you described there a permanent injury or not?

A. Yes.

Q. You mean by that what,—that it is permanent?

A. Yes, sir.

Q. What would you say his present condition is as to his lung?

A. Well, as a result of that pneumonia and that abscess in the lung, there was more or less adhesions formed between the pleura and the lung, that are permanent.

Q. Now I will ask, you, taking into consideration the facts, that he fell this distance of ten or fifteen feet from this platform, together with your first examination, and your subsequent attendance upon him, and the facts you learned there, and taking into consideration his present condition, as you have described it, will this condition in all reasonable probability continue to be permanent as to the lung?

A. Yes, sir.

THE APPELLATE COURT WILL ONLY CONSIDER ERROR APPARENT ON THE FACE OF THE RECORD.

This court and the Supreme Court of the United States have repeatedly held that they have no authority to review the discretion of the trial court in granting or denying a motion for new trial, and that the office of such motion is directed solely to the trial court.

In *Arkansas Valley Land Co. vs. Mann*, 103 U. S. 69, it was contended, after the trial court had di-

rected a remission of the verdict, that the very act of the court in doing so, showed that the verdict was the result of passion and prejudice. The Supreme Court of the United States said:

> "But independently of this view, and however it was ascertained by the court that the verdict was too large by the above sum, the granting or refusing a new trial in a Circuit Court of the United States is not subject to review by this court * * *. Equally beyond our authority to review, upon a writ of error sued out by a party against whom a verdict is rendered, is an order overruling a motion for a new trial, after the plaintiff, with leave of the court, has remitted a part of the verdict. *Whether the verdict should be entirely set aside upon the ground that it was excessive, or was the result of prejudice, or of a reckless disregard of the evidence or of the instructions of the court, or whether the verdict should stand after being reduced to such amount as would relieve it of the imputation of being excessive, are questions addressed to the discretion of the court, and cannot be reviewed at the instance of the party in whose favor the reduction was made.* Under what circumstances, if any, a party who is compelled to remit a part of the verdict, in order to prevent a new trial, can complain before this court, we need not decide in the present case. Parsons v. Bedford, 28 U. S., 3 Pet. 433, 447 (7:732); Mercantile Mut. Ins. Co. vs. Folsom, 85 U. S. 18 Wall. 237, 248 (21:827, 832); New York Cent. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 31 (25:531, 534.)
>
> "If the Circuit Court had entered judgment for the whole amount of the verdict below, the defendant could have made no question in this court as to its being excessive. We could only,

> in that case, have considered matters of law arising up on the face of the record. And we can do no more when the defendant brings to us a record, showing that the court below has, in the exercise of his discretion, compelled the opposite side, as a condition of its overruling a motion for a new trial, to remit a part of the verdict."

In *Wabash Railroad vs. McDaniels,* 101 U. S. 454, it was contended before the appellate court that the verdict was excessive.

Justice, Harlan, delivering the opinion of the court, said:

> "That we are without authority to disturb the judgment, *upon the ground that the damages are excessive, cannot be doubted.* Whether the order overruling the motion for new trial based upon that ground, was erroneous or not, our power is restricted to the determination of questions of law arising upon the record." R. R. Co v. Fraloff, 100 U. S. 31 (XXV., 534.)

The Circuit Court of Appeals (ninth circuit) held in *Alexander vs. United States,* 57 Fed. 828·

> "Upon the first point the law is well settled. The decisions of the circuit and district courts upon motion for a new trial are not reviewable. It is held that the motion for a new trial is designed only to invoke the judgment of the trial court upon the alleged errors set out in the motion, and that its office and function are limited to that court. Doswell v. DeLaLanza, 20 How. 29; Railway Co. v. Struble, 109 U. S. 381, 3 Sup. Ct. Rep. 270; Missouri Pac. Ry. Co. v. Chicago & A. R. Co., 132 U. S. 191, 10 Sup. Ct. Rep. 65; Ayers v. Watson, 137 U. S. 584, 11 Sup. Ct. Rep. 201; Fishburn v. Railway Co., 137 U. S. 60, 11 Sup. Ct. Rep. 8. *And the rule*

is applicable to the circuit court of appeals. Railway Co. v. Howard, 1. C. C. A. 229, 49 Fed. Rep. 206; McClellan v. Pyeatt, 1 C. C. A. 613, 50 Fed. Rep. 688.

Again in Campbell vs. Moran Bros., 97 Federal 477 (ninth circuit) this court said:

> "The overruling of a motion for a new trial is not assignable as error, under the practice established in the court of the United States. Tthis has been repeatedly held by the Supreme Court and by the circuit court of appeals. Moore vs. U. S., 150 U. S. 57; 14 Sup. Ct. 26; Holder v. U. S., 150 U. S. 91, 14 Sup. C. T. 10; Blitz v. U. S., 153 U. S. 308, 14 Sup. Ct. 924; Wheeler v. U. S. 159 U. S. 523, 524, 16 Sup. Ct. 93; Sigafus v. Porter, 51 U. S. App. 693, 28 C. C. A., 443, 84 Fed. 430; Railway Co. v. Charless, 7 U. S. App. 359, 2 C. C. A. 380, 51 Fed. 562."

No complaint has been made of any instruction, no exception thereto being taken. There is no error on the face of the record and the judgment should be affirmed.

Respectfully submitted,

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